NO. 46239-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARRELL NELSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge
The Honorable Garold E. Johnson, Judge
The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant his constitutional right to a public trial.

2. The court erroneously admitted evidence of other acts under ER 404(b).

3. The trial court erred by not ruling on appellant's writ for habeas corpus.

Issues Pertaining to Assignments of Error

1. The trial court took peremptory challenges by having the parties note on a chart which prospective juror they wanted to excuse. The peremptory challenges were made outside the hearing of those in the courtroom. The court announced the names of the prospective jurors chosen to sit on the venire, but did not state which party had excused other prospective jurors. Later that day, the court filed the peremptory challenges chart. Where the trial court did not analyze the Bone-Club[1] factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

2. Did the court commit reversible error in ruling that evidence of appellant's prior acts in the days before the charged were

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

admissible under ER 404(b)[2] where (1) the evidence was not admissible under the res gestae exception to ER 404(b); (2) the court did not make required findings on the record before admitting the evidence; and (3) the jury probably viewed the prior acts as evidence of appellant's character and action in conformity therewith to commit the charged crime in the absence of a limiting instruction?

3. Appellant filed a writ of habeas corpus setting forth arguments as to each identified "grounds for relief." The trial court declined to rule on appellant's writ explaining, "I haven't made any ruling on it. There was no petition filed. It was just a writ." 6RP[3] 23. Did the court abuse its discretion by failing to rule on appellant's writ?

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[2] ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] This brief refers to the verbatim report of proceedings as follows: 1RP – July 2, 2013; 2RP – November 14, 18, 19, 21 and 25, 2013; 3RP – February 24, 25, 26, 27, 2014 & March 3, 4, 5, 6, 7, 10, 2014; 4RP – April 14, 15, 16, 17, 21, 22, 23, 24, 2014; 5RP – April 25, 2014; 6RP – May 9, 2014.

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County prosecutor charged appellant Darrell Nelson with one count of second degree assault with a deadly weapon. CP 1-2. After a pretrial CrR 3.5 hearing, some of Nelson's custodial statements were held admissible. CP 75-78; 2RP 92-93. A mistrial was declared shortly thereafter because of the need for additional discovery. 2RP 126-28.

Nelson was represented by counsel during his first trial. See 3RP. A mistrial was declared after the jury could not reach a verdict. 3RP 799-802. Nelson represented himself during his second trial. 4RP 4; CP 116-17.

A jury found Nelson guilty. CP 168; 5RP 2-6. The jury also returned special verdicts finding the assault involved domestic violence, that Nelson and the complaining witness were members of the same family, and that Nelson committed the assault with a deadly weapon. CP 169-71. The trial court sentenced Nelson to 9 months imprisonment. The trial court also imposed a consecutive 12-month deadly weapon enhancement. CP 221-34; 6RP 15-16. Nelson timely appeals. CP 237.

2. Trial Testimony

Nelson is the father of six children, including R.J.N., and R.X.N. 4RP 422-24. Nelson obtained a medical marijuana card and began growing medical marijuana in his home after suffering a job related injury.

3RP 558-63; 4RP 425, 680. R.J.N. helped Nelson cultivate and maintain the marijuana. 4RP 425, 428, 455, 680, 701.

Beginning in January 2013, R.J.N. noticed Nelson became more aggressive and less trusting of people. 4RP 426, 484. Around that time, Nelson asked his two oldest children to move out of the family home. 4RP 424-27. R.J.N. and R.X.N. said Nelson would cut holes in the ceiling of the home to stop people from going into the attic and taking his marijuana. 4RP 427-28, 446-48, 685-86, 699. R.J.N. denied any marijuana was kept in the attic, explaining that Nelson kept it in a locked room. 4RP 447, 592.

About five days before the charged assault, Nelson threatened suicide. R.J.N. called the police. 4RP 445, 485-87, 592, 687-88. Nelson did not punish R.J.N. for calling the police. 4RP 455, 458.

On March 11, 2013, R.J.N. returned home from school. R.X.N. told R.J.N. to stay out of the house, explaining Nelson was in a bad mood. 4RP 460-61, 683-84. R.J.N. planned to use the bathroom and then leave the house. 4RP 461, 689, 719. Nelson met R.J.N. as he walked into the house. 4RP 461, 490, 706. Nelson told R.J.N. to go to his room. 4RP 462, 490-91. Nelson also tried to grab R.J.N., leaving scratches on his neck. 4RP 462. R.J.N. felt no immediate pain from the scratches. 4RP 463.

Inside the house, R.J.N. set his backpack on the ground in the kitchen. 4RP 469-70, 598-99. Nelson pushed R.J.N. into the stove and then picked up the backpack. 4RP 464-65, 470, 495, 514, 689-90, 693, 703, 709-10. Nelson began looking through the backpack. 4RP 470. R.X.N. explained Nelson suspected R.J.N. was stealing marijuana. 4RP 690. R.J.N. told Nelson to stop. Nelson responded that if R.J.N. would not respect his privacy then he would not respect R.J.N.'s privacy. R.J.N. tried to take the backpack from Nelson but was pushed away. 4RP 470-71, 569. Nelson read a note found inside the backpack. 4RP 528, 694. R.J.N. told Nelson to stop reading the note and tried to grab the backpack. 4RP 471, 694, 707-08.

Nelson took a knife from the kitchen sink and pointed it toward R.J.N. 4RP 471-73, 603, 694-95, 731. Nelson held the knife about two feet from R.J.N. 4RP 472, 695. Nelson told R.J.N. he would make an example of R.J.N. 4RP 600-01, 696, 707, 733. The knife never touched R.J.N. and Nelson did not move toward R.J.N. with the knife. 4RP 559, 579, 616.

R.J.N. left the home and went to a neighbor's house. 4RP 475, 608-09, 707, 715. R.J.N. called the police, explaining that Nelson tried "to choke him out." 4RP 588-89, 620. Police responded to the house where R.J.N. called police. 4RP 340-41. Police saw two scratches and a

small amount of blood on R.J.N.'s neck and chest. 4RP 341-42, 387-88. R.J.N. told officers Nelson held a knife to his throat. 4RP 354-55, 388, 409. R.J.N. declined medical treatment. 4RP 563.

Police then went to Nelson's home. Nelson came outside when asked. 4RP 355-56. Police arrested Nelson. 4RP 356, 380. Nelson was cooperative. 4RP 400. Nelson told officers he kicked two older sons out of his home because he believed they were conspiring with R.J.N. to steal marijuana. 4RP 386. Police saw holes in the ceiling of the home. 4RP 359, 365-66, 413-16.

Police took a knife from the home that R.X.N. said was used. 4RP 360, 364, 393. R.J.N. did not identify the knife at that time. 4RP 394. The knife was not tested for fingerprints. 4RP 403, 771, 774. Police did not examine the backpack, note, or determine whether R.J.N. was stealing marijuana. 4RP 772-74.

3. 404(b) Evidence

At the first trial the State sought to admit evidence that there had been an alleged incident of violence between Nelson and R.J.N. several days before the charged assault. 3RP 213-15. The prosecutor explained: "So I would only be offering it to support [R.J.N.'s] essentially fear, not that he's credible, because he's previously suffered, you know, acts of domestic violence." 3RP 215. The prosecutor noted it would not seek to admit

evidence of Nelson's alleged threatened suicide that occurred on the same day. 3RP 215-16. Defense counsel objected to the admission of this evidence. 3RP 216-19.

The trial court excluded the evidence explaining, "...the violence of that moment [charged assault] would put any reasonable person in fear potentially. I don't think there's really a need to – much of a need to explore the past behind that." 3RP 222. The trial court further explained:

> And the concern now is, is look, if we're going to get into the past and into all the things that have happened in the past; not only does it get us down this path of what really happened in the past, which is not necessarily terrible helpful and very time-consuming, but it also takes us into a situation where now we're not judging the defendant on his conduct on that day but on you know, he sped yesterday he must be speeding today kind of analysis.

3RP 222.

At the second trial, the State again sought to admit evidence of Nelson's prior acts. 4RP 133-35. The State acknowledged most of the prior acts were not admitted in the previous trial, but that, it wanted to admit evidence of Nelson's threatened suicide and punching of holes in the ceiling of his house if evidence of Nelson's medical marijuana grow was introduced. 3RP 134, 138. The State argued the evidence was relevant to explain why R.J.N. was fearful the day of the charged incident. 3RP 141.

Nelson objected to admission of this evidence, arguing that it was not relevant and would be unfairly prejudicial. 4RP 135-36. Nelson noted the holes were placed in the ceiling a "couple of weeks" before the charged incident. 4RP 134, 137. The alleged threatened suicide occurred four days before the charged incident. 4RP 139.

The trial court disagreed the evidence was not relevant, explaining, the holes in the ceiling "may be" relevant as res gestae. 3RP 136. The trial court concluded, "...the activities of the defendant in the days leading up to this are – it seems like it would be part of the re gestae, considering the children were talking about a pattern of behavior causing them to have fear of the defendant." 4RP 142-43. In denying Nelson's motion to exclude the evidence, the trial court further explained, "It sounds like we are going to include the holes in the ceiling, so I don't know that this is 404(b) evidence in the sense that it is evidence of some prior conduct or bad act to show conformity of that. Rather, it is part of the – as I say, it is part of the even itself that extended over a period of time." 4RP 143.

Armed with this ruling, the prosecutor elicited through R.J.N. and R.X.N.'s testimony that Nelson had threatened suicide and stabbed holes in the ceiling of his house in the days before the charged incident. 4RP 426-28, 446-48, 452, 484-87, 592. Nelson's timely relevance and "404(b)"

objections to R.J.N.'s testimony were overruled. 4RP 426, 453. No instruction limiting the jury's consideration of this evidence was given.

4. Jury Selection

Jury selection in Nelson's case lasted two days. On the first day, the trial court swore in the venire, announced the charges against Nelson, and explained the process of jury selection. 4RP 154-71. The trial court asked prospective jurors if personal experiences would cause any of them to doubt whether they could remain fair and impartial. In open court, the judge asked the potential jurors to explain their concerns about remaining fair and impartial in a case of this type and they did so. 4RP 171-83. After questioning by each party, the trial court excused several jurors for cause. 4RP 214-17, 221-22, 235.

The parties resumed questioning the venire the following day. A short recess was taken after questioning ended. 4RP 491-92. During the recess, the trial court told the parties, "if you want to start on your peremptory challenges, go right ahead." 4RP 292. Shortly thereafter, the jury panel reentered the courtroom, and the trial court announced, "The parties have some paperwork that they have to do. While they're doing that, you are free to talk about anything at all except this case." 4RP 292. The record next indicates: "Off the Record – Discussion." 4RP 292.

The trial court did not first consider the Bone-Club factors before deciding the peremptory challenge process should be shielded from public sight and hearing. Neither party objected to this portion of jury selection.

After the "off the record discussion," the trial court called out 13 juror names and excused the remaining jurors so they could return to Jury Administration. 4RP 292-93. Later that same day, the court filed a chart showing which party excused which prospective juror. Supp. CP __ (Peremptory Challenges, filed 4/16/14).

C. ARGUMENT

1. THE TRIAL COURT VIOLATED NELSON'S RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). The state constitution also requires that "[j]ustice in all cases shall be administered openly." CONST. art. I, section 10. Whether a defendant's public trial right has been violated is a question of law, subject to de novo review on direct appeal. State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d

291 (2004). This is a core safeguard in our system of justice. Wise, 176 Wn.2d at 5. The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial right is also for the benefit of the accused: "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948)).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. Wise, 176 Wn.2d at 16-19l; Strode, 167 Wn.2d at 231; State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). A public trial right violation may be raised for the first time on appeal and does not require an objection at trial to preserve the error. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014).

a. Peremptory Challenges Implicate the Public Trial Right.

The Supreme Court has held the public trial right attaches to the voir dire portion of jury selection. See e.g. Wise, 176 Wn. 2d at 12 n.4; In re Pers. Restraint of Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Nonetheless, the Court has also explained that application of the experience and logic test is necessary to determine whether the public trial right attaches to other portions of the jury selection process. State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) (citing with approval State v. Wilson, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

Recently, this Court, relying in part on its previous opinion in State v. Wilson, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013), held the exercise of peremptory challenges was not a part of "voir dire." State v. Marks, __ Wn. App. __, 339 P.3d 196, 199 (2014), petition for review

pending (2015). This Court therefore determined that application of the "experience and logic" test was necessary and ruled that the private exercise of peremptory challenges did not implicate the public trial right, relying on its opinion in State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014). Marks, 339 P.3d at 199-200. That decision, in turn, relied on Division Three's decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted in part by, State v. Love, 181 Wn.2d 1029, 340 P.3d 228 (2015) in rejecting a similar argument. Dunn, 180 Wn. App. at 574-75.

Contrary to the Marks opinion, the Wilson decision supports that the public trial right attaches not only to "for-cause," but also to peremptory challenges. There, the Court applied the "experience and logic" test adopted by this Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. Wilson, 174 Wn. App. at 333. This Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, this Court expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes

part of "voir dire," to which the public trial right attaches). Thus, in Wilson, this Court appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40.

The Court's attempt in Marks to reframe its prior consideration of the matter makes little sense. The Court observes that CrR 6.4(b) refers to "voir dire examination." Marks, 339 P.3d at 199. But, contrary to the Court's reasoning, the court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from "voir dire" as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and this Court presumes statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). The Court's reframing of its discussion of the matter in Wilson violates this principle. Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of "voir dire." Contrary to the Marks opinion, and consistent with the earlier decision in Wilson, such challenges are part of that portion of jury selection that

must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

Assuming for the sake of argument that the exercise of challenges is *not* an integral part of jury selection, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

But the result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Nelson can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of

jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[4] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions

[4] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, Love, the Division Three case relied on in Dunn, appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret — written — peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that Thomas challenged the practice suggests it was atypical even at the time.

Other Washington cases similarly suggest for-cause and peremptory challenges were historically made in open court. See State v. Njonge, 181 Wn.2d 546 (2014); State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). Moreover, Washington statutes governing voir dire indicate challenges were historically made in open court. As the Love court noted in a footnote, "RCW 4.44.240 does provide for testimony if

needed to assess a question of jury bias." Love, 176 Wn. App. at 919 n.7.

RCW 4.44.240 provides:

> When facts are determined under RCW 4.44.230,[5] the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

Significantly, before its amendment in 2003, this statute referred to this process as a "trial of a challenge." RCW 4.44.240 (2002); Code 1881 s 218. As the Love court could not deny: "that aspect of jury selection would appear to need to take place in the public courtroom[.]" Love, 176 Wn. App. at 919 n.7. Yet, the court failed to give this requirement any significance, remarking only "we do not believe that the evidence gathering function should be confused with the legal question of whether a juror displays disqualifying bias." Id.

But the Love court does not explain why the challenge or the court's ruling would be divorced from the "trial" of the challenge or not

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[5] RCW 4.44.230 provides:

> The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall determine the facts and decide the issue.

conducted at the same time. As the Supreme Court has recognized, the presumption is in favor of openness. Paumier, 176 Wn.2d at 34-35.

Moreover, the next statutory provision provides: "[t]he challenge, the exception, and the denial may be made orally. The judge shall enter the same upon the record, along with the substance of the testimony on either side." RCW 4.44.250. This provision lends further weight to the conclusion the evidence gathering function and legal question of juror bias are part of the same proceeding, to which the public trial right attaches. In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

The state may argue the subsequent filing of the Record of Jurors sufficiently protects the core concerns of the public trial right. See e.g. State v. Filitaula, __ Wn. App. __, 339 P.3d 221 (2014). In Filitaula, Division One noted "a record of information about how peremptory challenges were exercised could be important, for example, in assessing whether there was a pattern of race-based peremptory challenges." Filitaula, 339 P.3d at 224. Thus, Division One implicitly recognized that peremptory challenges implicate public trial rights. However, the court found no public trial right violation, because a member of the public could later access a form the parties filled out to exercise their peremptory challenges. Filitaula, 339 P.3d at 224.

Regardless of when the form was filed, Division One's rationale should be rejected outright, because a piece of paper fails to adequately insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. It is simply unrealistic to assume, as did Division One, that members of the public would be able to recall the specific features of so many individuals. As a result, public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

b. The Peremptory Challenge Portion of Jury Selection Was Closed.

As indicated above, the record reflects that peremptory challenges were exercised through the use of a piece of paper passed back and forth between the parties. The court did not announce on the record which party challenged which juror. The end result is that the public was excluded to the same extent as if the courtroom doors had been locked.

Physical closure of the courtroom is not the only situation that violates the public trial right. For example, a closure occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009); Strode, 167 Wn.2d at 224); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Members of the public here were no more able to approach the bench and/or parties and listen to an intentionally private voir dire process then they are able to enter a locked courtroom, access the judge's chamber's or participate in a private hearing in a hallway. The practical impact is the same; the public is denied the opportunity to scrutinize events.

c. The Closure Was Not Justified.

Under Bone-Club, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260.

Here, there is nothing on the record to indicate the court considered any of the Bone-Club factors before closing the proceeding. The closure therefore was not justified and reversal is required. State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

2. THE COURT'S WRONGFUL ADMISSION OF OTHER ACT EVIDENCE UNDER ER 404(b) UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.

The jury heard evidence that Nelson threatened suicide and punched holes in the ceiling of his house several days before the charged incident. Reversal is required because (1) the trial court did not make required findings on the record before admitting this evidence; (2) the evidence was

not admissible under the res gestae exception to ER 404(b); and (3) the jury probably viewed the prior acts as evidence of Nelson's character and action in conformity therewith to commit the charged crime in the absence of a limiting instruction.

b. The Court Erred In Admitting The Evidence Under ER 404(b) Because It Misapplied The Res Gestae Rule And Otherwise Failed To Make Proper Findings On The Record To Justify Admission.

Interpretation of an evidentiary rule is a question of law reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court correctly interprets the rule, the trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. Id. "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255

(2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336.

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes. One of these purposes is proof of res gestae. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989). Res gestae evidence completes the story of the crime by proving the immediate context of happenings near in time and place. Id. To qualify as res gestae,"[t]he other acts should be inseparable parts of the whole deed or criminal scheme." Id.

Evidence that Nelson threatened suicide and cut holes in the ceiling of his house several days before the charged crime does not qualify as res gestae because it is not an inseparable part of the assault. Mutchler, 53 Wn. App. at 901. Nelson's other acts were not "a link in the chain of an unbroken sequence of events surrounding the charged offense." State

v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (citation omitted). Nor were prior acts part of the "same transaction" as the charged assault. Mutchler, 53 Wn. App. at 901-02. The jury would have still heard the complete story of the assault in the absence of evidence that Nelson had engaged in other acts in the days before the assault.

Moreover, evidence must still meet the requirements of ER 404(b) to be admissible under a res gestae theory. Mutchler, 53 Wn. App. at 901. When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. Foxhoven, 161 Wn.2d at 175. This analysis must be conducted on the record. Id. "Doubtful cases should be resolved in favor of the defendant." Wade, 98 Wn. App. at 334.

The trial court identified the purpose of res gestae but it did not find these prior acts occurred by a preponderance of the evidence. This was error. Foxhoven, 161 Wn.2d at 175.

The trial court further failed to balance its probative value against its potential for unfair prejudice on the record. "Without such balancing and a conscious determination made by the court on the record, the

evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The Court failed to conduct this required balancing test.

Even if the court had conducted a balancing analysis, the evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed whatever marginal probative value it retained. Under ER 404(b), the evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence that Nelson threatened suicide and cut holes in the ceiling of his house was hardly necessary to prove that he committed the assault.

Further, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Saltarelli, 98 Wn.2d at 361-62. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). This evidence portrayed Nelson in an extremely bad light and likely provoked an emotional response from the jury that interfered with what should have been a rational deliberation process.

c. Erroneous Admission Of The ER 404(b) Evidence Allowed The Jury To Convict Nelson On The Basis Of Character Evidence.

Evidentiary error is grounds for reversal if it results in prejudice. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An error is not harmless if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Smith, 106 Wn.2d at 780. Here, the outcome of Nelson's trial was materially affected by evidence of the prior acts.

Evidence of other misconduct is prejudicial because it "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), overruled on other grounds by, State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Bowen, 48 Wn. App. at 196.

This prejudicial effect was compounded by the court's failure to give a limiting instruction. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). Without a limiting instruction, the jury was free to consider the prior acts as evidence of Nelson's unstable character and action in conformity therewith in committing the charged assault. Nelson's case stands in contrast to those cases in which ER 404(b) errors were found harmless because the trial court instructed the jury to consider the

evidence only for a limited purpose. See, e.g., State v. Giffing, 45 Wn. App. 369, 373-74, 725 P.2d 445 (1986) (probative value of evidence showing motive for killing was not outweighed by prejudice; jurors were cautioned to use evidence only for its appropriate and limited purpose), rev. denied, 107 Wn.2d 1015 (1986).

Moreover, a prosecutor exacerbates the prejudicial nature of erroneously admitted prior acts evidence by commenting on it in closing argument. State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). The prosecutor in Nelson's case did just that by stating the following:

> Now, what is relevant? Well, certainly, the defendant's irrational paranoid behavior preceding the days up to March 11, 203, that's relevant. Why is that? Because you heard testimony that the defendant had increasingly become suspicious to the point where he was poking holes in the ceiling with a metal rod. You saw the pictures.

4RP 805-06.

In a close case, where the reviewing court cannot determine whether the defendant would or would not have been convicted but for the error, the error is not harmless. State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968), cert. denied, 393 U.S. 1081 (1969). Nelson's is that close case. This Court should therefore reverse the conviction and remand for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO RULE ON NELSON'S WRIT FOR HABEAS CORPUS.

Before sentencing, Nelson filed a writ of habeas corpus setting forth arguments as to each of his five identified "grounds for relief." CP 172-220. At sentencing, Nelson asked to add additional argument to the writ of habeas corpus. 6RP 22-23. The trial court declined to rule on appellant's writ explaining, "I haven't made any ruling on it. There was no petition filed. It was just a writ." 6RP 23. The trial court abused its discretion by failing to rule on Nelson's writ for habeas corpus.

A person may prosecute a writ of habeas corpus in superior court to challenge the lawfulness of government restraint. RCW 7.36.010; In re Pers. Restraint of Becker, 96 Wn. App. 902, 903, 982 P.2d 639 (1999), aff'd, 143 Wn.2d 491, 20 P.3d 409 (2001). Under RCW 10.73.090, a detained person may petition for a writ of habeas corpus within one year of the judgment and sentence becoming final.

Trial courts have discretion to grant or deny an application for a writ of habeas corpus. Fathers v. Smith, 25 Wash.2d 896, 899-900, 171 P.2d 1012 (1946). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Junker, 79 Wn.2d at 26. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal

standard. Littlefield, 133 Wn.2d at 47 (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." Neal, 144 Wn.2d at 609.

A court necessarily abuses its discretion "if it based its ruling on an erroneous view of the law." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). It is also an abuse of discretion for a court to utterly fail to exercise its discretion. See, e.g., State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (categorical refusal to consider sentencing alternative is abuse of discretion).

That is what occurred here. Rather than exercise its discretion in ruling on Nelson's writ of habeas corpus, the trial court abused its discretion by utterly failing to exercise its discretion. Nelson's writ of habeas corpus was timely under RCW 10.73.090, and the relief sought under the motion was clearly articulated. See e.g., State v. Davis, 137 Wn.2d 288, 292, 242 P. 31 (1926) (recognizing the inapt use of words "makes no difference" if the purpose and intention of the motion is "perfectly plain"). The trial court's failure to rule on Nelson's writ for habeas corpus is manifestly unreasonable and amounts to an abuse of discretion. Remand for a ruling on the writ of habeas corpus is required.

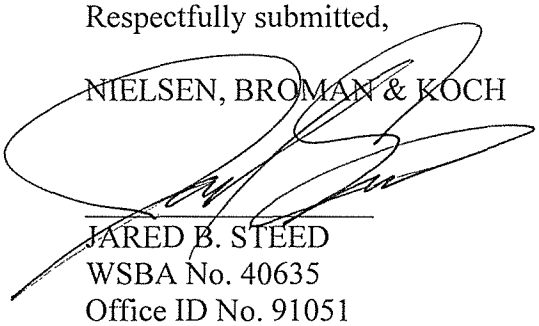
D. CONCLUSION

For the reasons stated, this Court should reverse Nelson's conviction and remand for a new trial.

DATED this 23rd day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Office ID No. 91051
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46239-7-II
	)	
DARRELL NELSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF FEBRUARY 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DARRELL NELSON
3324 S. M STREET
TACOMA, WA 98418

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 23, 2015 - 2:23 PM

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Court of Appeals Case Number: 46239-7

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